Seatadvisor Sdn Bhd v Perbadanan Stadium Malaysia (a body corporate established under the Perbadanan Stadium Malaysia Act 2010)

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO WA-22NCvC-246–04 OF 2021
HAYATUL AKMAL J
26 AUGUST 2022

Civil Procedure — Interim payment — Circumstances when ordered — Plaintiff sued defendant for outstanding payments due under contract for installation and operation of ticketing system at sports complex — Plaintiff applied for interim payment under O 22A ROC from defendant pending disposal of its suit — Whether plaintiff had shown on balance of probabilities that it would obtain judgment against defendant for a substantial sum of money apart from any damages and costs — Whether plaintiff had satisfied requirements under O 22A and the law for its application to be allowed — Rules of Court 2012 O 22A

In 2017, the defendant, pursuant to a letter of offer ('LO'), had appointed the plaintiff to be its ticketing company/promoter for events held at the KL Sports City ('KLSC'). The appointment required the plaintiff to invest in the software, hardware and technology to design, install and maintain a new ticketing system for the KLSC. In return, the plaintiff was to have the exclusive ticketing rights to the operation of the new ticketing system at the KLSC for ten years to recover its investment in the project. The parties entered into a service agreement ('SA') pursuant to which the plaintiff commenced work on the installation of the new ticketing system. A change in the ruling government the following year saw a change in the management of the defendant. Disputes arose between the plaintiff and defendant when the latter began appointing other parties to manage the ticketing of events at the KLSC in breach of the terms of the LO and SA. The plaintiff contended that it was not paid in respect of several events that held at the KLSC where its ticketing system was used and that as at 24 May 2021, the defendant owed the plaintiff a sum of RM893,134.60. When the defendant invited tenders on its website from parties interested to become its ticketing agent for events at the KLSC, the plaintiff applied for an injunction to restrain the defendant from proceeding with the tender exercise until its suit against the defendant had been disposed of. Thereafter, the plaintiff filed the instant application ('encl 102') pursuant to O 22A and/or O 92 r 4 of the Rules of Court 2012 ('the ROC') and/or s 25A of the Courts of Judicature Act 1964 for an order that the defendant make an interim payment of RM893,134.60 to the plaintiff within seven days. The defendant opposed encl 102 on the grounds, inter alia, that: (a) the plaintiff

had not shown on balance of probabilities that if the action proceeded to trial, it would obtain judgment against the defendant for a substantial sum of money apart from any damages or costs; (b) the sum claimed by the plaintiff was disputed; (c) the plaintiff failed to show it would suffer hardship if the interim payment was not granted; (d) the defendant had a set off against the plaintiff's claim; (e) encl 102 was a tactical move by the plaintiff to force the court to make an early determination of its claim before trial; (f) no interim payment order under O 22A of the ROC could not be made against the defendant as it was a government body; and (g) s 35 of the Perbadanan Stadium Act 2010 immunised the defendant from any action or prosecution for its bona fide acts or omissions.

Held, allowing encl 102 but for a reduced sum of RM500,000 payable by the defendant to the plaintiff within 30 days from the date of the order:

(1) The defendant's arguments in opposing encl 102 had no merit. Order 22A of the ROC applied to the defendant. The defendant was not the government. It was trite in administrative law that a statutory body like the defendant did not fall within the definition of Federal Government or State Government. The plaintiff had shown on balance of probabilities that if the action proceeded to trial, it would secure a judgment for a substantial sum of money against the defendant. No evidence of hardship suffered by the plaintiff needed to be shown to justify its application under encl 102 (see para 16).

(2) The required legal threshold was merely on a preponderance of the evidence (civil burden) and considering the entire materials and arguments produced by the plaintiff, the scale tilted in its favour for an order of interim payment against the defendant. It was trite that there was no necessity for the plaintiff to show that it would suffer prejudice if the interim payment was denied. Neither was there a legal necessity to show that a particular sum was required to cover a need. The court was not concerned with how the money was to be spent. The legal issues between the parties would eventually be canvassed, ventilated and determined at the substantive hearing of the suit. In balancing the parties' interests in an application for interim payment, the court only required reasonable certainty (rather than absolute certainty) that the proposed interim payment amount was likely to be the minimum sum the plaintiff could recover from the defendant if the action proceeded to trial (see paras 17–18).

(3) Section 35 of the Perbadanan Stadium Malaysia Act 2010 offered no protection to the defendant at this juncture as it had yet to be established by compelling evidence that the defendant had acted in good faith or otherwise. This issue was unsuitable for summary disposal (see para 17).

[Bahasa Malaysia summary

Pada 2017, defendan, menurut surat tawaran ('LO'), telah melantik plaintif untuk menjadi syarikat tiket/penganjur untuk acara yang diadakan di KL Sports City ('KLSC'). Pelantikan tersebut memerlukan plaintif melabur dalam perisian, perkakasan dan teknologi untuk merekabentuk, memasang dan menyelenggara sistem tiket baharu untuk KLSC. Sebagai balasan, plaintif mempunyai hak tiket eksklusif untuk operasi sistem tiket baharu di KLSC selama sepuluh tahun untuk mendapatkan semula pelaburannya dalam projek tersebut. Pihak-pihak menandatangani perjanjian perkhidmatan ('SA') yang mana plaintif memulakan kerja pemasangan sistem tiket baharu. Perubahan dalam kerajaan yang memerintah pada tahun berikutnya menyaksikan perubahan dalam pengurusan defendan. Pertikaian timbul antara plaintif dan defendan apabila mereka mula melantik pihak lain untuk menguruskan tiket acara di KLSC yang melanggar terma LO dan SA. Plaintif berhujah bahawa ia tidak dibayar berhubung dengan beberapa acara yang diadakan di KLSC di mana sistem tiketnya digunakan dan bahawa pada 24 Mei 2021, defendan berhutang kepada plaintif sejumlah RM893,134.60. Apabila defendan mempelawa tender di laman webnya daripada pihak yang berminat untuk menjadi ejen tiketnya untuk acara di KLSC, plaintif memohon injunksi untuk menghalang defendan daripada meneruskan pelaksanaan tender sehingga samannya terhadap defendan telah dilupuskan. Selepas itu, plaintif memfailkan permohonan semasa ('lampiran 102') menurut A 22A dan/atau A 92 k 4 Kaedah-Kaedah Mahkamah 2012 ('KKM') dan/atau s 25A Akta Mahkamah Kehakiman 1964 untuk memerintahkan defendan membuat bayaran interim sebanyak RM893,134.60 kepada plaintif dalam tempoh tujuh hari. Defendan menentang lampiran 102 atas alasan, antara lain, bahawa: (a) plaintif tidak menunjukkan atas imbangan kebarangkalian bahawa jika tindakan tersebut diteruskan ke perbicaraan, ia akan mendapatkan penghakiman terhadap defendan untuk sejumlah wang yang banyak selain daripada sebarang ganti rugi atau kos; (b) jumlah yang dituntut oleh plaintif telah dipertikaikan; (c) plaintif gagal menunjukkan ia akan mengalami kesusahan jika bayaran interim tidak diberikan; (d) defendan mempunyai penolakan terhadap tuntutan plaintif; (e) lampiran 102 adalah langkah taktikal oleh plaintif untuk memaksa Mahkamah membuat penentuan awal tuntutannya sebelum perbicaraan; (f) tiada perintah pembayaran interim di bawah A 22A KKM tidak boleh dibuat terhadap defendan kerana ia adalah badan kerajaan; dan (g) s 35 Akta Perbadanan Stadium 2010 memberi imunisasi kepada defendan daripada sebarang tindakan atau pendakwaan atas perbuatan atau peninggalannya yang bona fide.

Diputuskan, membenarkan lampiran 102 tetapi untuk jumlah terkurang RM500,000 yang perlu dibayar oleh defendan kepada plaintif dalam tempoh 30 hari dari tarikh perintah:

(1) Hujah defendan dalam menentang lampiran 102 tidak mempunyai

merit. Aturan 22A KKM terpakai untuk defendan. Defendan bukan kerajaan. Ia adalah undang-undang pentadbiran yang mantap bahawa badan berkanun seperti defendan tidak termasuk dalam definisi Kerajaan Persekutuan atau Kerajaan Negeri. Plaintif telah menunjukkan atas imbangan kebarangkalian bahawa jika tindakan tersebut diteruskan ke perbicaraan, ia akan mendapatkan penghakiman untuk sejumlah wang yang besar terhadap defendan. Tiada bukti kesusahan yang dialami oleh plaintif perlu ditunjukkan untuk mewajarkan permohonannya di bawah lampiran 102 (lihat perenggan 16).

(2) Ambang undang-undang yang diperlukan adalah semata-mata atas kelebihan keterangan (beban sivil) dan mengambil kira keseluruhan bahan dan hujah yang dikemukakan oleh plaintif, skala condong memihak kepada perintah pembayaran interim terhadap defendan. Sudah menjadi kebiasaan bahawa tidak ada keperluan bagi plaintif untuk menunjukkan bahawa ia akan mengalami prejudis jika pembayaran interim dinafikan. Tidak ada keperluan undang-undang untuk menunjukkan bahawa jumlah tertentu diperlukan untuk menampung keperluan. Mahkamah tidak mengambil berat tentang bagaimana wang tersebut dibelanjakan. Isu undang-undang antara pihak-pihak akhirnya akan dibincangkan, diventilasi dan ditentukan pada pendengaran substantif saman tersebut. Dalam mengimbangi kepentingan pihak-pihak dalam permohonan untuk pembayaran interim, mahkamah hanya memerlukan kepastian munasabah (bukan kepastian mutlak) bahawa amaun bayaran interim yang dicadangkan berkemungkinan merupakan jumlah minimum yang boleh diperolehi oleh plaintif daripada defendan jika tindakan diteruskan ke perbicaraan (lihat perenggan 17–18).

(3) Seksyen 35 Akta Perbadanan Stadium Malaysia 2010 tidak memberikan perlindungan kepada defendan pada ketika ini kerana ia masih belum dapat dibuktikan dengan keterangan yang meyakinkan bahawa defendan telah bertindak dengan suci hati atau sebaliknya. Isu ini tidak sesuai untuk pelupusan ringkas (lihat perenggan 17).]

Cases referred to

AJS v JMH and another appeal [2022] 1 MLJ 778, FC (refd)
Ahmad Zaini bin Japar v TI Offshore Sdn Bhd [2002] 7 MLJ 604, HC (refd)
Air Hitam Tin Dredging Malaysia Sdn Bhd v YC Chin Enterprise Sdn Bhd [1994] 2 MLJ 754, SC (refd)
Charles Grenier Sdn Bhd v Lau Wing Hong [1996] 3 MLJ 327, FC (refd)
David Chelliah @ Kovilpillai Chelliah David v Monorail Malaysia Technology Sdn Bhd & Anor [2005] 2 MLJ 260, CA (refd)
Eckhardt Marine GmbH v Sheriff, High Court of Malaya, Seremban & Ors [2001] 4 MLJ 49, CA (refd)
Genneva Malaysia Sdn Bhd v Tio Jit Hong & Ors [2020] 6 MLJ 703, CA (refd)

Josu Engineering Construction Sdn Bhd v TSR Bina Sdn Bhd [2015] 5 MLJ 411; [2015] AMEJ 1544; [2016] 1 CLJ 1, CA (refd)
JNA Ikhtisas Sdn Bhd v Kerajaan Malaysia [2015] 11 MLJ 257, HC (refd)
KL Karnival Sdn Bhd v Perbadanan Stadium Malaysia [2019] MLJU 836, HC (refd)
Ling Sie Kiong, the liquidator v SG & Sons Sdn Bhd [2021] 8 MLJ 819, HC (refd)
Main-Line Corporate Holdings Ltd v United Overseas Bank Ltd [2010] 2 SLR 986, CA (refd)
Mohd Shukri bin Mat (administrator to the estate of Wan Mek bt Wan Abdullah @ Wan Eshah bin Wan Abdullah) v Wan Rahmah bt Wan Abdullah (administrator to the estate of Wan Abdullah bin Wan Ahmad) [2018] 3 MLJ 89; [2017] 1 LNS 1941, CA (refd)
Shearson Lehman Bros Inc and others v Maclaine Watson & Co Ltd and others [1987] 2 All ER 181, CA (refd)
Tebin bin Mostapa (as administrator of the estate of Hj Mostapa bin Asan, deceased) v Hulba-Danyal bin Balia & Anor (as joint administrators of the estate of Balia bin Munir, deceased) [2020] 4 MLJ 721, FC (refd)
Uthama Kumara Naidu a/l Sundara Rajoo & Anor v HSBC Bank Malaysia Bhd & Ors [2021] MLJU 1143, HC (refd)
Yii Ting Tung v PP [2015] 3 MLJ 596, CA (refd)

Legislation referred to

Courts of Judicature Act 1964 s 25A
Government Proceedings Act 1956 s 2, Part III
Interpretation Acts 1948 and 1967 s 3
Perbadanan Stadium Malaysia Act 2010 s 35
Public Authorities Protection Act 1948 s 36
Rules of Court 2012 O 1 r 4, O 14, O 22A, O 22A rr 2, 3, 4, 4(c), 5, 6, 9, O 29 rr 11, 12, 12(a), O 42 r 12, O 73 r 9A, O 92 r 4

S Muhillan (Dennis Nik & Wong) for the plaintiff.
Darren Lai (with Chew Zhen Tau) (Ahmad Deniel, Ruben & Co) for the defendant.

Hayatul Akmal J:

[1] The plaintiff applied under encl 102 for an order that the defendant is to make interim payment(s) to the plaintiff under O 22A r 2, r 4(c), r 5, r 6, and/or O 92 r 4 of the Rules of Court 2012 ('the RC 2012') and/or s 25A of the Courts of Judicature Act 1964 ('the CJA') for the sum of RM893,134.60 within seven days and costs of this application be borne by the plaintiff.

[2] The cause papers and submissions are as follows:

(a) notice of application dated 28 February 2021 (encl 102);

(b) affidavit in support affirmed by Dirk Emil Sass on 28 February 2022 (encl 103);

(c) the defendant's affidavit in reply affirmed by Mohd Faidz bin Sanusi on 28 March 2022 (encl 107); and

(d) the plaintiff's affidavit in reply affirmed by Dirk Emil Sass on 20 April 2022 (encl 19).

Submissions/replies by the parties.

[3] On 13 May 2022, after considering all-cause papers and written and oral submissions of the respective counsels, I allowed encl 102 with a reduced amount of RM500,000 payable within 30 from the date of this order with costs of RM5,000 to be paid within 14 subject to 4% allocatur. Dissatisfied, the defendant filed this appeal, and my reasons are as follows.

BRIEF FACTS

[4] The brief facts gathered from the cause papers and parties' respective submissions are as follows:

(a) around 2017, the defendant had appointed Total Sports Asia (TSA) to advise the defendant on the commercialisation of the KL Sports City. Mr Fathullah Suhaimi bin Abdul Wahid (Mr Edy), the Chief Operating Officer of TSA, was designated to advise the defendant on that exercise;

(b) in the course of advising the defendant on the new ticketing access control system for the KL Sports City (new ticketing system), Mr Edy suggested the defendant undertake a request for proposal (RFP) exercise by inviting ticketing companies and/or ticket promoters to submit their proposal to redevelop the existing system at the KL Sports City (RFP exercise);

(c) on being selected from the RFP exercise, the successful party must enter into an agreement with the defendant agreeing that:

(i) the selected ticketing company and/or ticketing promoter would have to invest in the software, hardware, and technology to design, supply, deliver, install, test, commission, and maintain the new ticketing system; and

(ii) in return, the selected ticketing company and/or ticketing promoter would have the exclusive ticketing rights of the new ticketing system for ten years to cover the investment.

(d) sometime in 2017, the defendant carried out the RFP exercise, and on being advised by Mr Edy, the plaintiff was selected to be the defendant's ticketing partner for the new system. The system by the plaintiff (Seat Advisor's Box Office System: SABO) would create KL Sports City's ticketing system and/or a white label system for the defendant called KL Sports City Ticketing. Mr Edy affirmed this position in a statutory declaration on 22 November 2019. Further, stating that the defendant would incur no costs;

(e) on 9 March 2017, by a letter of offer, the defendant notified the plaintiff that it had been selected to enter into an agreement to redevelop the ticketing system of the KL Sports City. The said letter indicated the commencement of the contract from 15 March 2017 until 14 March 2027, a ten-year term: exh DES17, encl 15;

(f) parties then entered into a service agreement on 15 March 2017 for the design, supply, delivery, installation, test, commission, and maintenance of the new ticketing access control system for the defendant: exh DES18, encl 15. From this agreement, the plaintiff had invested and continues to invest a total sum of RM2,122,190 for various services and/or work done under the terms of the said agreement. Though the parties have never signed the said agreement, they acted on it by performing its terms and conditions:

(i) it was not signed due to the change in the board of the defendant. The change in the government led to the reconstitution of the defendant's management, including changes in the Chairman with the appointment of Tan Sri Dr Anthony Francis Fernandez, the CEO, and the GM;

(ii) the new Chairman started to utilise Air Asia RedTix, and other ticketing providers such as TicketCharge to promote and/or sell tickets at the KL Sports City while the plaintiff was still present. Two different payment gateways have been authorized by the defendant to be integrated into the KL Sports City Ticketing system, which are the ipay88 and First Data;

(iii) Mr Azman Fahmi bin Osman (Mr Azman) was the CEO of the defendant from May 215 to mid-January 2019. During his time, parties entered into the letter of offer dated 9 March 2017 and the service agreement dated 15 March 2017. He had affirmed a statutory declaration on 15 May 2020 asserting that the position parties were in on the agreement and parties had performed the terms and conditions and/or obligations under the letter of offer dated 9 March 2017 and the service agreement dated 15 March 2017: exh DES19, encl 15;

(iv) at the end of September 218, Mr Nik Razeen Adam Daud (Mr Nik)

was appointed as one of the defendant's board of directors and replaced Mr Azman as the CEO in mid-January 2019;

(v) after this change, several issues and/or disputes arose between the plaintiff and the defendant when the defendant started to appoint and/or allow other ticketing companies and/or ticketing agents to sell and/or manage tickets for the events held at the KL Sports City in breach of the letter of offer dated 9 March 2017 and the service agreement dated 15 March 2017; and

(vi) the new management of the defendant refused and/or delayed payments to the plaintiff for several events at the KL Sports City, which used SABO Ticketing System. As of 24 May 2021, the amount of RM893,134.60 is still due and owing.

(g) the defendant had committed several breaches of the letter of offer dated 9 March 2017 and the service agreement dated 15 March 2017. Other ticketing companies had advertised and/or sold tickets for several events held at the KL Sports City, which they could not do without the defendant's approval: exh DES20, encl 15;

(h) on 5 March 2020, in breach or inconsistent with the contractual arrangement with the plaintiff, the defendant had advertised an offer to tender on their official website vide 'Tawaran Tender Bil 1/2020-Pelantikan Agen Ticket PSM'. The title of the tender exercise is 'Cadangan Pelantikan Agen Tiket Perbadanan Stadium Malaysia secara request for proposal (RFP)': exh DES-21, encl 15;

(i) on 10 July 2020, the plaintiff applied for an injunction to restrain the defendant from appointing a new ticketing partner under the Tender Exercise dated 5 March 2020 carried out by the defendant pending the full and final disposal of OS 1043 (encl 3). The defendant had, on 8 October 2020, vide their solicitors' letter, provided an undertaking not to proceed with the tender exercise dated 5 March 2020 pending the disposal of OS 1043 at the High Court: exh DES3, encl 103; and

(j) on 28 February 2022, the plaintiff filed encl 102 for an interim payment of the sum of RM893,134.60 against the defendant.

SUBMISSIONS BY THE PLAINTIFF

[5] In support of encl 102, the plaintiff cited:

(a) O 22A r 2 of the RC 2012:

> 2 Application for interim payment (O 22A, r 2*)*
>
> (1) The plaintiff may, at any time after the writ has been served on a defendant and the time limited for him to acknowledge service has expired, apply to the

Court for an order requiring the defendant to make an interim payment.

(b) O 22A r 4(c) of the RC 2012:

> If, on the hearing of an application under r 2, the Court is satisfied that —
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> ...
>
> (c) if the action proceeded to trial, the plaintiff would obtain a judgment against the defendant for a substantial sum of money apart from any damages or costs,
>
> the Court may, if it thinks fit and without prejudice to any contention of the parties as to the nature or character of the sum to be paid by the defendant, order the defendant to make an interim payment of such amount as it thinks just, after taking into account any set off, crossclaim or counterclaim on which the defendant may be entitled to rely.

(c) the plaintiff cited in support:

(i) *David Chelliah @ Kovilpillai Chelliah David v Monorail Malaysia Technology Sdn Bhd & Anor* [2005] 2 MLJ 260 (CA):

> O 22A r 1 provides as follows:
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> 8. Interim payment, in relation to a defendant, means a payment on account of any damages, debt, or other sums (excluding costs) which he may be held liable to pay to or for the benefit of the plaintiff ....
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> 9. Thus, under this rule, the court may, on an application by the plaintiff, order interim payment to be made pending the outcome of the civil suit.
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> ...
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> 12. The standard of proof required in an application for interim payment is on the balance of probabilities and not beyond reasonable doubt (see *Mediahouse Sdn Bhd v Koh Kim Suan* [1998] 3 AMR 2338, which followed *Ricci Burns Ltd v Toole & Anor* [1989] 3 All ER 478).
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> 13. English case law and commentary make it clear that the underlying purpose of O 22A is to provide for an interim payment to alleviate a plaintiff's hardship which may exist during the period from the commencement of an action to the conclusion of the trial: see *Shearson Lehman Bros Inc v Maclaine Watson & Co Ltd* [1987] 2 All ER 181 *at p 190 where the English Court of Appeal also observed that when construing the rule, the court should be slow to adopt a construction that would defeat the evident purpose of the rule. (see also* Halsbury Laws of Malaysia Vol 1 (2002 Reissue) at p 552 Civil Procedure rs (UK) p 513). Further, there is no necessity for the plaintiff to show that he would suffer prejudice if he did not obtain an interim payment (*Schott Kem Ltd v Bentley & Ors* [1990] 3 All ER 850); *neither must he show that a particular sum is required to cover a need (Stringman v McArdle* [1994] 1 WLR 1653*). In*

awarding an interim payment, the court is not concerned with how the money is to be spent (Stringman).

17. In refusing the appellant's application, the learned judge was of the view that the appellant would not obtain a judgment for substantial damages at trial later because the appellant had not proven that his condition had deteriorated in the two years since the accident. With respect, we did not agree with the learned judge. We agreed with the learned counsel for the appellant that the learned judge misunderstood the purpose of O 22A and its application. As adverted to earlier, the purpose of O 22A is to provide an interim payment to alleviate a plaintiff's hardship during the period before trial. There was no necessity for the appellant to make out a case that his condition had deteriorated so that an interim payment was needed to meet a worsening medical condition. It is worthy of note that O 22A *is available to any plaintiff and not limited only to a plaintiff whose condition is deteriorating.*

(ii) *Shearson Lehman Bros Inc and others v Maclaine Watson & Co Ltd and others* [1987] 2 All ER 181 (CA) Eng:

At p 187:

... Something more than a prima facie case is clearly required but not proof beyond a reasonable doubt. The burden is high. But it is a civil burden on the balance of probabilities, not criminal. This involves no lasting hardship on the defendants since there is a provision for readjustment at the trial in the case of an overpayment.

...

At p 190:

This leads me to my next point. Although the power given by each rule is separate, the underlying purpose of the two rs is the same: to mitigate hardship or prejudice to a defendant which may exist during the period from the commencement of an action to the trial. Further, the underlying task of the court under each rule is the same: ordering an interim payment of such amount as is just, having regard to all the circumstances. Accordingly, when construing each r, the court should be slow to adopt a construction which would significantly defeat the evident purpose of both rs, forming, as they do, part of a single code.

(iii) *Josu Engineering Construction Sdn Bhd v TSR Bina Sdn Bhd* [2015] 5 MLJ 411; [2016] 1 CLJ 1 (CA) observed:

LEGAL PRINCIPLES ON INTERIM PAYMENT

[8] An interim payment of damages can be made in accordance with O 22A of the RC 2012, where the court is 'satisfied' that 'the plaintiff has obtained a judgment against the defendant for damages to be assessed' (see r 3(b)), or 'if the action proceeded to trial, the plaintiff would

obtain a judgment for substantial damages against the defendant' (see r 3(c)). A

[9] As shown above, r 3(c) allows interim payment of damages even though liability is still in question.

[10] Courts in England have interpreted the burden placed upon a plaintiff seeking interim payment to be Something more than a prima facie (at first glance) standard, but something less than the criminal standard. B

[18] O 22A of the RC 2012 does not restrict interim payment of damages to any type of action. In England, where the approach is to identify particular types of claims in which an interim payment may be made, the rs essentially cover every type of action. C

[21] Thus, in our view, interim payments can be rrdered in actions other than personal injury cases, such as proceedings for contractual claims, actions for wrongful death, product liability actions, wrongful dismissal claims, trespass to land, misappropriation of funds, and actions for property damaged. D

[22] There are strong policy grounds for the courts to order interim payments in an appropriate case. It is in the interests of the administration of justice and plaintiffs in particular that defendants be encouraged to make early voluntary interim payments to alleviate financial hardship on the part of the plaintiffs. E

(iv) *Uthama Kumara Naidu a/l Sundara Rajoo & Anor v HSBC Bank Malaysia Bhd & Ors* [2021] MLJU 1143 (HC) observed: F

[15] Discussing the current English rs (which are in pari materia with those contained in the Malaysian O 22A of RC 2012), this is how the required standard of proof is treated in *Blackstone's Civil Practice*, 208 (at p 454, para 36.9): G

On an application under CPR, r 25.7(1)(c), (d), the court has to be satisfied on the balance of probabilities that the claimant 'would' obtain a judgment. This wording is identical to that used in the old rules (RSC, O 29, rr 11(1)(c) and 12(1)(c)), and it ought to be the case, despite the new approach to interpretation, that the same principles will apply regarding the standard of proof on these two grounds. If so, it has to be shown that the claimant will win on the balance of probabilities, but at the upper end of the scale, the burden being a high one. Being likely to succeed at trial is not enough. H

[20] To succeed in his application, the third defendant here has the burden of proving on a balance of probabilities that he will succeed in his counterclaim if the action proceeds to trial, that the plaintiffs would be held liable to pay to the third defendant a sum of money in respect of the plaintiffs use and occupation of the property even if a final judgment or order were given or made in favor of the plaintiffs. I

A [37] On the circumstances of this case, the third defendant, in my view, is entitled to interim payment to alleviate his hardship until the trial is concluded while the Plaintiffs and/or their relatives, despite the first defendant's termination of possession upon recall of the loan, continue in occupation and enjoyment of the property without paying anything. Simply put, not ordering interim payment would be grossly unfair to the third sefendant. After all, justice should also be for the third defendant and not just the plaintiffs.

(d) the goals of this provision are:

C (i) to cater for an interim payment to alleviate the plaintiff's hardship which may exist during the period from the commencement of an action to the conclusion of the trial;

(ii) no necessity to show that plaintiff would suffer prejudice if an interim payment is denied;

D (iii) no legal necessity to show that a particular sum is required to cover a need. The court is not concerned with how the money is to be spent; and

(iv) no need to make out a case the plaintiff suffers.

E (e) to succeed, the plaintiff must prove on the balance of probabilities that if the action proceeded to trial, the plaintiff would obtain a judgment against the defendant for a substantial sum of money apart from any damages or costs.

F **[6]** The plaintiff claims in encl 89 (amended writ) for the following:

(a) a declaration that the letter of offer dated 9 March 2017 read together with the service agreement dated 15 March 2017 between parties is valid and binding;

G (b) an order for specific performance of the terms and conditions set out in the letter of offer dated 9 March 2017 read together with the service agreement dated 15 March 2017 against the defendant; and

H (c) the defendant to pay the plaintiff the sum of RM647,923.60 (as of 22 June 2020) and RM893,134.60 (as of 24 May 2021) being the outstanding sum due and owing for the work done under the letter of offer dated 9 March 2017 read together with the said service agreement dated 15 March 2017.

I The defendant took the position to dispute the existence of the service agreement dated 15 March 2017 based on its non-execution by the parties, though they performed the terms and/or obligations in the said letter of offer read together with the service agreement. The position of the letter of offer is not disputed by the defendant and is clear on its contents:

(i) the parties to the contract/agreement;

(ii) the scope of work;

(iii) the date of enforcement of the contract/agreement;

(iv) the durations of the contract/agreement;

(v) the special requirement of the contract/agreement, which includes but is not limited to the plaintiff being the exclusive ticketing provider for the events held at the Kuala Lumpur Sports City;

(vi) the amount of investment to be borne by the plaintiff; and

(vii) the booking fee for a ticket for the events to be held at the Kuala Lumpur Sports City.

These preceding terms and conditions are mirrored in the service agreement dated 15 March 2017. Though unsigned, parties had proceeded on it by way of performance and cited:

(a) *Charles Grenier Sdn Bhd v Lau Wing Hong* [1996] 3 MLJ 327 (FC), observed that:

> We have examined the two letters that passed between the parties. We are unable to find that the parties intended that there should be no concluded contract until a formal sale and purchase agreement had been executed by them. On the contrary, we find their objective intention to be traveling in quite the opposite direction.
>
> They have identified the parties to the transaction with sufficient clarity. So too did the property, the price, and the terms they considered essential. Such an agreement is termed an 'open contract.' It is enforceable as if it was embodied in a document with all the attendant solemnity. In order to give it effect, the law will — acting out of necessity (see *Liverpool City Council v Irwin* [1977] AC 239) — imply terms into the contract for sale in order to make it work. See *Rojasara Ramjibhai Dahyabhai v Jani Narottamdas Lallubhai* [1986] 3 SCC 300, where it was held that there was to be implied in a contract for the sale of land a covenant on the part of the vendor to do all things necessary to give effect to the agreement.
>
> Dr Geoffrey Cheshire, in the 10th edition of his work, *The Modern Law of Real Property*, describes an open contract as follows:
>
> If a contract for sale specifies merely the names of the parties, a description of the property, and a statement of the price, it is called an open contract. When this form of contract is made, the parties are bound by certain obligations implied by the law. The phrase 'subject to the sale and purchase agreement' relied on by counsel for the appellant does not, in our judgment, point to an intention that no contract was to come into existence until a formal sale and purchase agreement had been prepared and executed. Rather, it is, when read in the context of the correspondence and the objective aim of the transaction — and this is how we read them — indicative of an intention to merely

formalize the agreement already concluded between the parties. We, therefore, entertain no difficulty whatsoever in rejecting the argument advanced by Mr Abraham upon the first issue.

(b) *Mohd Shukri bin Mat (administrator to the estate of Wan Mek bt Wan Abdullah @ Wan Eshah bin Wan Abdullah) v Wan Rahmah bt Wan Abdullah (administrator to the estate of Wan Abdullah bin Wan Ahmad)* [2018] 3 MLJ 89; [2017] 1 LNS 1941 (CA) observed that:

> 65. We, of course, have no quarrel with the learned JC that a valid and enforceable contract can be made orally. In this regard, we would refer to the case of *Sulisen Sdn Bhd v Kerajaan Malaysia* [2006] MLJU 341; [2006] 7 CLJ 247, in which Abdul Malik Ishak J (as he then was) had set out the following guideline on what constitutes a valid and enforceable contract:
>
> A simple contract requires little formality. A contract may be written; it may be partly written and partly oral; it may be wholly oral and may even be implied from the actions of the parties. The essentials of any contract are the rights, duties, and liabilities that arise from the promise or promises made by the parties ... The essential elements of any contract are:
>
> (i) offer;
>
> (ii) acceptance;
>
> (iii) consideration (not required for contracts under seal);
>
> (iv) intention to be bound;
>
> (v) mutuality;
>
> (vi) capacity; and
>
> (vii) legality.
>
> The offer and acceptance, when taken together, would form the 'agreement' and that agreement must be supported by consideration in order to establish the obligation.

(c) *Eckhardt Marine GmbH v Sheriff, High Court of Malaya, Seremban & Ors* [2001] 4 MLJ 49 (CA) observed that:

> First, the general approach that is to be adopted by a court in determining whether there is an agreement concluded between the parties is to see whether there is a definite offer made by one party which has been accepted by the other. In other words, whether the agreement in question may be resolved into an offer and a corresponding acceptance. That such an approach should be generally adopted was affirmed by the House of Lords in *Gibson v Manchester City Council* [1979] 1 All ER 972 ...
>
> Second, there are a number of guidelines we emphasize that these are only guidelines that have been formulated by courts to ascertain whether there was an offer in a given case and by whom it was made. Thus, as a general rule, an advertisement is considered by courts to be not an offer but a mere invitation

> to treat, that is to say, an offer to make offers ...
>
> Third, an offer may be made unconditionally or upon stated conditions. In the latter case, an acceptance to be valid must accord with the terms of the offer. A conditional offer lapses upon the failure of the condition. If authority is required for these rather elementary propositions, it may be found in *Financings Ltd v Stimson* [1962] 3 All ER 386.
>
> Fourthly, the act of acceptance may be either by words or by conduct, or it may be partly by words and partly by conduct. *Brogden v Metropolitan Railway Co* [1877] 2 App Cas 666 is a case of acceptance by conduct. ...

Followed in *JNA Ikhtisas Sdn Bhd v Kerajaan Malaysia* [2015] 11 MLJ 257:

> [31] Although there is no formal contract entered between the parties, the elements of offer, acceptance, and consideration necessary for the formation of a contract are clearly present. The offer was made by the defendant, which was accepted by the plaintiff.

[7] In light of the foregoing, it was argued that:

(a) the defendant had made an invitation to treat vide the RFP exercise;

(b) the plaintiff made an offer by submitting its proposals to the defendant: exh DES3 on pp 145–165, encl 3;

(c) the defendant accepted the plaintiff's offer by issuing the letter of offer dated 9 March 2017; and

(d) in consideration, the plaintiff agreed to invest the initial and total investment of RM2,122,190 in return for ten years of exclusive ticketing rights of the new ticketing system to cover the investment and profits.

The defendant accepted the plaintiff's offer to redevelop the ticketing system at the Kuala Lumpur Sports City vide the letter of offer dated 9 March 2017 and allowed the plaintiff to redevelop the ticketing system at the Kuala Lumpur Sports City called SeatAdvisor Box Office System ('SABO'). In developing and implementing SABO, the plaintiff:

(i) invested and/or expensed its funds into drilling mounting and cable holes, wiring the input/output and 12DC power cable from the turnstile to the scanner box, installing the network cable and network switches, installing the scanner box casing to the turnstiles panel, installing the scanner box and cable termination and texting and commissioning of the Bukit Jalil Scanner Box: exh DES9 at pp 219 to 231, encl 3;

(ii) according to the letter of offer dated 9 March 2017 and the service agreement dated 15 March 2017, the ticket fee for each ticket for the

events held at KL Sports City is RM300. On numerous occasions, the defendant requested a discount on the ticket fee from the normal ticket fee;

(iii) upon the defendant's request, the plaintiff has issued several emails stating that the plaintiff agrees to give a discounted price from the normal ticket price;

(iv) the defendant's acceptance of the discounted ticket fees by the plaintiff without protest vide the plaintiff's emails and/or goes to show that the defendant had full knowledge of the existence of the letter of offer dated 9 March 2017 and the service agreement dated 15 March 2017. The plaintiff will rely on the emails at the trial properl;

(v) when a promoter for an event held at the Kuala Lumpur Sports City approaches the defendant, the promoter will enter into an agreement known as the facility license agreement with the defendant. The defendant prepares this facility license agreement, and the plaintiff is not a party to the same. From the facility license agreements, the defendant had referred to and acknowledged that the plaintiff is the exclusive ticketing partner for all events held at the Kuala Lumpur Sports City: exh DES25 and exh DES26 on pp 810–839 and 841–867, encl 106; and

(vi) as of 24 May 2021, the amount of RM893,134.60 is still owed by the defendant to the plaintiff for the events held at KL Sports City, which used the SABO Ticketing System: exh DES22 at pp 747–748, encl 15.

In *Genneva Malaysia Sdn Bhd v Tio Jit Hong & Ors* [2020] 6 MLJ 703 (CA) observed that:

> [50] It is trite law that apart from writings, the conduct of parties may amount to acceptance.
>
> [51] In *Eckhardt Marine GMBH v Sheriff Mahkamah Tinggi Malaya & Ors* [2001] 4 MLJ 49; [2001] 3 CLJ 864, at p 869 para d, Gopal Sri Ram JCA held as follows:
>
> > Fourthly, the act of acceptance may be either by words or by conduct, or it may be partly by words and partly by conduct. *Brogden v Metropolitan Railway Co* [1877] 2 App Cas 666 is a case of acceptance by conduct.
> >
> > So much for what we consider to be the applicable law.
> >
> > In the present instance, there is no doubt that the Sheriff's advertisement amounted to an invitation to treat. It is the appellant who made a conditional offer by way of the letter in question. The Sheriff clearly accepted the appellant's offer. He did so by words and by conduct. He applied to the judge for leave to sell. He ensured the satisfaction of the appellant's conditions by obtaining confirmation from the relevant authority. The learned judge undertook careful scrutiny of the evidence and came to the conclusion that there was a valid and binding contract between the parties. We were unable to detect any error in his

reasoning, and we found no difficulty whatsoever in upholding his judgment. A

[8] The plaintiff further argued that:

(a) it has consistently issued invoices and/or other supporting documents for the events held at the Kuala Lumpur Sports City. However, the defendant failed and/or refused to make the payments in breach of their contractual arrangements; B

(b) the said proformas and/or invoices for all the events held at the Kuala Lumpur Sports City would be uploaded onto an online application known as QuickBooks when the invoices become due, and the defendant would receive a notification via email: exh DES23 at pp 750 to 759, encl 15; C

(c) these proforma and tax invoices in exh DES24 will verify the sum of RM893,134.60 sought by the plaintiff in this application for interim payments from the defendant. If the action proceeded to trial, the plaintiff would obtain a judgment against the defendant for the RM893,134.60 apart from any damages to be assessed and costs; D

(d) the plaintiff will be able to ascertain the total loss suffered by the defendant's conduct in appointing other ticketing companies to promote and/or sell tickets for the events held at the Kuala Lumpur Sports City from 1 May 218 until the date of the judgment herein. E

In *Uthama Kumara Naidu a/l Sundara Rajoo & Anor v HSBC Bank Malaysia Bhd & Ors* [2021] MLJU 1143 observed that: F

> [36] I am also acutely aware that it is quite possible that the Court, in exercising its discretion to order interim payment, may err in paying out too much. However, the court has wide powers to make adjustments to this sum at the conclusion of the trial as provided by O 22A r 9, *which states:*
>
> Adjustment on final judgment or order or discontinuance (O 22A r 9) G
>
> 9. Where a defendant has been Oed to make an interim payment or has, in fact, made an interim payment, whether voluntarily or pursuant to an O, the Court may, in giving or making a final judgment or O, or granting the plaintiff leave to discontinue his action or to withdraw the claim in respect of which the interim payment has been made, or at any other stage of the proceedings on the application of any party, make such order with respect to the interim payment as may be just, and in particular: H
>
> (i) an order for the repayment by the plaintiff of all or part of the interim payment, with or without interest; but where interest is Oed, it shall not exceed fifty percent of the rate as specified under O 42 r 12 I
>
> (ii) an order for the payment to be varied or discharged; or
>
> (iii) an order for the payment by any other defendant of any part of the interim payment which the defendant who made it is entitled to

recover from him by way of contribution or indemnity or in respect of any remedy or relief relating to or connected with the plaintiff's claim.

(e) the defendant is not the government. It is a statutory body, whereas it is trite that the definition of government means the Federal Government or the State Government. To claim it to be the Government as defined is misconceived and cited:

(i) *Ling Sie Kiong, the liquidator v SG & Sons Sdn Bhd* [2021] 8 MLJ 819 (HC):

> [35] I have also been referred to the Government Proceedings Act 1956 by counsel for DBKL to state that there is an 'All debts due and claims owing from time to time by any person to the government under s 10 thereto. It must, however, be noted that under s 2 of the Government Proceedings Act 1956 *that the definition of 'government' refers to 'the federal government and the governments of the states*. There is absolutely no mention of a local government being part of the said definition of 'government' under the Government Proceedings Act 1956, and thus DBKL's counsel contention as to the same is highly misconceived.

(ii) *Tebin bin Mostapa (as administrator of the estate of Hj Mostapa bin Asan, deceased) v Hulba-Danyal bin Balia & Anor (as joint administrators of the estate of Balia bin Munir, deceased)* [2020] 4 MLJ 721 (FC):

> [30] In our opinion, the rules governing statutory interpretation may be summarised as follows. First, in construing a statute, effect must be given to the object and intent of the Legislature in enacting the statute. Accordingly, the duty of the court is limited to interpreting the words used by the Legislature and to give effect to the words used by it. The court will not read words into a statute unless a clear reason for it is found in the statute itself. Therefore, in construing any statute, the court will look at the words in the statute and apply the plain and ordinary meaning of the words in the statute. Second, if, however, the words employed are not clear, then the court may adopt the purposive approach in construing the meaning of the words used. Section 17A of the Interpretation Acts 1948 and 1967 provides for a purposive approach in the interpretation of statutes. Therefore, where the words of a statute are unambiguous, plain, and clear, they must be given their natural and ordinary meaning. The statute should be construed as a whole, and the words used in a section must be given their plain grammatical meaning. It is not the province of the court to add or subtract any word; the duty of the court is limited to interpreting the words used by the Legislature, and it has no power to fill in the gaps disclosed. Even if the words in a statute may be ambiguous, the power and duty of the court 'to travel outside them on a voyage of discovery are strictly limited. Third, the relevant provisions of an enactment must be read in accordance with the legislative purpose and applies, especially where the literal meaning is clear and reflects the purposes of the

> enactment. This is done by reference to the words used in the provision, where it becomes necessary to consider every word in each section and give its widest significance. An interpretation that would advance the object and purpose of the enactment must be the prime consideration of the court so as to give full meaning and effect to it in the achievement of the declared objective. As such, in taking a purposive approach, the court is prepared to look at much extraneous materials that bear on the background against which the legislation was enacted. It follows that a statute has to be read in the correct context and that as such the court is permitted to read additional words into a statutory provision where clear reasons for doing so are to be found in the statute itself.

Therefore, O 73 r 9A of the RC 2012 is unambiguous because an application under O 22A of the RC 2012 cannot be made against the Government. The term 'Government' has been clearly defined in s 2 of the Government Proceedings Act 1956, O 1 r 4 of the RC 2012, and s 3 of the Interpretation Acts 1948 and 1967. Being a corporate body, the defendant does not fall within the definition of 'Government' and cited:
AJS v JMH and another appeal [2022] 1 MLJ 778 (FC) was also cited that observed:

> [36] As stated by *NS Bindra's in Interpretation of Statutes* (12th Ed) at pp 347–348 on the Presumption of Fairness:
>
> > Where there are two constructions, the one of which will do great and unnecessary injustice, and the other of which will avoid injustice and will keep exactly within the purpose for which the statute was passed, it is the bounden duty of the court to adopt the second and not to adopt the first of those constructions. Too literal a construction should not be followed when it leads to absurdity if a somewhat more liberal construction would lead to an effective application of the Act. The underlying purpose of all legislation is to promote justice among men.

(f) s 35 protection of the Perbadanan Stadium Malaysia Act 2010 can only be relied on if the defendant had acted in good faith. This is not the first time the defendant had attempted to rely on and/or 'hide' behind the provisions of s 35 of the Perbadanan Stadium Malaysia Act 2010 citing *KL Karnival Sdn Bhd v Perbadanan Stadium Malaysia* [2019] MLJU 836 (HC) observed:

> [6] Akibat daripada itu, plaintif telah memfailkan tuntutannya di atas pecah perjanjian yang kononnya dilakukan oleh defendan sepertimana di dalam pernyataan tuntutan terpinda plaintif. Maka, defendan pula telah memfailkan permohonan ini untuk membatalkan writ saman dan pernyataan terpinda di atas sebab tindakan ini adalah remeh, tidak munasabah, 'frivolous' dan penyalahgunaan kuasa bersandarkan kepada perkara-perkara berikut:

Seksyen 35 Akta Perbadanan Stadium Malaysia memberi perlindungan kepada defendan dan ejen-ejennya bahawa apa-apa tindakan yang dilakukan oleh mereka, mereka tidak boleh didakwa/disaman di Mahkamah melainkan ianya dilakukan bukan secara suci hati (*good faith*);

(ii) Terdapatnya perhubungan 'tanpa prasangka' yang mana defendan tidak terikat dengannya.

[32] Defendan telah 'invoke' Seksyen 35 yang memberi kekebalan kepada defendan daripada didakwa, disaman dan lain-lain asalkan tindak-tanduk defendan dilakukan dengan suci hati/good faith. Seksyen 35 Akta tersebut berbunyi:

35 Protection against the suit and legal proceedings

No action shall lie, or prosecution shall be brought, instituted, or maintained in any court against —

(a) the Perbadanan;

(b) any member of the Perbadanan, any member of a committee, or any officer, servant, or agent of the Perbadanan; or

(c) any other person lawfully acting on behalf of the Perbadanan, in respect of any act or omission done or omitted by it or him in good faith in such capacity.

[33] Sama ada defendan berjaya dilindungi oleh peruntukan ini bergantung kepada tindakan-tindakan defendan yang defendan perlu buktikan telah dibuat secara suci hati. Ini semua bergantung kepada fakta yang mana hanya boleh dibuktikan secara perbicaraan penuh.

[34] Tambah-tambah lagi defendan pula telah mempertikaikan bahawa isu 'bad faith/bukan suci hati' tidak diplidkan oleh plaintif. Mahkamah tidak bersetuju dengan dapatan defendan ini. Di dalam hal ini, setelah meneliti pliding, kertas kausa dan hujahan pihak-pihak, mahkamah mendapati isu suci hati ini adalah satu 'live issue' yang mana melibatkan persoalan sama ada tindakan defendan untuk menamatkan kontrak tersebut dibuat secara suci hati atau tidak dan sama ada ianya ditamatkan secara sah atau tidak dan kes ini perlu dilihat secara keseluruhan. Justeru itu, kes ini bukanlah satu kes yang 'plain and obvious dan simple'. Ianya memerlukan satu perbicaraan penuh.

[43] Di atas alasan-alasan di atas, mahkamah memutuskan bahawa, permohonan defendan untuk membatalkan writ saman dan pernyataan tuntutan terpinda plaintif sewajarnya ditolak dengan kos dalam kausa.

Therefore, s 35 of the Perbadanan Stadium Malaysia Act 2010, which the defendant relied on, does not apply to encl 102. Similarly, s 36 of the Perbadanan Stadium Malaysia Act 2010 and the Public Authorities Protection Act 1948 are irrelevant to encl 102. The plaintiff has shown on the balance of probabilities that if the action proceeded to trial, the plaintiff would obtain a judgment against the

defendant for a substantial sum of money apart from any damages or costs; A

(g) concerning the defendant's arguments on the Malaysia Treasury Circular entitled 'Surat Setuju Terima, Pesanan Kerajaan dan Inden Kerajaan Bagi Perolehan Kerajaan,' which requires the presence of a duly executed and stamped agreement, it is argued that the plaintiff is a private company and an outsider to the management of the defendant is not bound by such internal matters of the defendant. It does not bind innocent third parties in any event: The rules in *Turquand*, and cited *Ahmad Zaini bin Japar v TI Offshore Sdn Bhd* [2002] 7 MLJ 604 (HC): B C

> But alas, Syed Alwi did not affirm an affidavit to assert that he did not write that damning letter. Thus, I must conclude, firstly, that these were not bona fide triable issues, and secondly, the plaintiff need not concern himself nor inquire into the regularity of the internal affairs of the defendant company, and the plaintiff was entitled to assume that all was being done regularly: Omnia praesumuntur rite ac solemniter esse acta (*Mahony v East Holyford Mining Co* (1875) LR 7 HL 869; *Bargate v Shortridge* (1855) 5 HL Cas 297, 318; *Re Land Credit Co of Ireland* (1869) LR 4 Ch 460, 469; *Re County Life Assurance Co* (1870) 5 Ch App 288 and *Duck v Tower Galvanizing Co* [191] 2 KB 314). To the plaintiff, Syed Alwi was nothing more than an agent of the defendant. To the plaintiff, Syed Alwi held the post of an executive director in the defendant's company. Thus, the plaintiff was entitled to assume, as he did, that all matters of internal management and procedure prescribed by the articles have been complied with. This principle is called the 'indoor management rule' or the 'rule in *Turquand*'s case (*Royal British Bank v Turquand* (1856) 6 E & B 327). The 'indoor management rule' is eminently practical and should be continued. No business could be carried on if a person dealing with the apparent agents of a company is compelled to call for evidence to show that the company's internal regulations have been duly observed. The law books are full of authorities on indoor management rule. Suffice for this exercise that I refer to some of them. In *County of Gloucester Bank v Rudry, etc., Co* [1895] 1 Ch 629, a person was dealing with a company, and later he obtained from the company a mortgage under seal signed by two directors and the secretary of the company. The articles contained no special provision in regard to the execution of such a document, but nevertheless, the mortgage had been sealed at a meeting where no quorum was present. The court held that the mortgage was good because the mortgagee had no means of knowing the internal irregularity in the management of the company. In *Duck v Tower Galvanizing Co*, debentures that were issued under the seal of the company were held to be valid even though there had been no meetings or resolutions of the company or the board. In *Mercantile Bank of India v Chartered Bank of India, Australia & China* [1937] 1 All ER 231, the court held that borrowing by agents of the company may effectively bind the company even though the agents borrowed in excess of the actual powers delegated to them. D E F G H I
>
> To the plaintiff, Syed Alwi held the post of an executive director of the

A defendant company, and the plaintiff need not concern himself as to what the powers were that had actually been delegated to Syed Alwi. In my judgment, the plaintiff can safely assume that Syed Alwi has the usual powers of a person in the position of an executive director. Atkin LJ in *Kreditbank Cassel Gmb H v Schenkers Ltd* [1927] 1 KB 826, 844 aptly described the position of a B director in these salient words:

> If you are dealing with a director in a matter which normally a director would have the power to act for the company, you are not obliged to inquire whether or not the formalities required by the articles have been complied with before he exercises that power.

C

(h) contrary to the arguments of the defendant, there is no necessity to establish hardship on the part of the plaintiff in making an application for an interim payment: *David Chelliah @ Kovilpillai Chelliah David v Monorail Malaysia Technology Sdn Bhd & Anor* [2005] 2 MLJ 260 (CA); D and

(i) the defendant is not entitled to a set off of his counterclaim. The plaintiff wishes to amend its pleadings to add a relief for an account and inquiry as to all the ticketing fees for the events held at the Kuala Lumpur Sports E City from 1 May 2018 until the date of the judgment herein payable by the defendant to the plaintiff.

In the circumstances, the plaintiff prays for an order in terms of encl 102 against the defendant with costs pending the disposal of this suit.

F SUBMISSIONS BY THE DEFENDANT

[9] In opposing encl 102, the defendant argued:

(a) encl 102 must be dismissed as it is misconceived in law and/or in fact:

G (i) the plaintiff failed to show on a balance of probability that if the action proceeded to trial, it would secure a judgment for substantial damages against the defendant;

(ii) the sum claimed to be due and owing by the defendant is disputed;

H (iii) the plaintiff failed to show hardship from the period of the commencement of this suit to its conclusion;

(iv) the defendant has a set off against the claim of the plaintiff;

I (v) the plaintiff failed to show that it has a strong case against the defendant with liability easily established; and

(vi) encl 102 is a technical manoeuvre forcing the court to make an early determination of the subject matter of the claim before trial.

(b) the defendant is a body corporate formed under the Perbadanan Stadium Malaysia Act 2010, under the Ministry of Youth and Sports. According to O 73 r 9A of the RC 2012, encl 102 is unsustainable:

> 9A. Interim order against the Government (O 73 r 9A)
>
> An application against the Government shall not be made under O 22A, r 2 in any proceedings against the Government or under O 22A, r 10 in any proceedings by the Government.
>
> It carries the same meanings as in Part III of the Government Proceedings Act 1956. The term government is defined in s 2 as 'includes the Federal Government and the Government of the States'. The word includes in a statutory definition is a word of enlargement: *Yii Ting Tung v Public Prosecutor* [2015] 3 MLJ 596. Therefore, the definition of the word government must necessarily include the defendant funded by the Ministry of Youth and Sports and cannot be subject to an order for interim payments under O 22A of the RC 2012;

(c) the defendant is protected under s 35 of the Perbadanan Stadium Act 2010, that state that no action shall lie or prosecution brought, instituted, or maintained in any court against the Perbadanan in respect of any act or omission done or omitted by it or him in good faith in such capacity. The defendant argued that it had throughout acted in good faith. The sum claimed (RM893,134.60) by the plaintiff involves the element of the public policy, considering the defendant's position. Enclosure 102 ought to be dismissed. Nothing shows that the plaintiff can secure a judgment for the sum claimed, that is highly disputed. The plaintiff had misrepresented to the defendant all material times that the service agreement had been executed at a meeting between parties on 15 October 2019. It could not be produced when asked for a copy of the signed agreement. Therefore, the defendant's position is that it did not enter into any service agreement with the plaintiff at any time;

(d) it is also to be accorded protection under s 36 in that the Public Authorities Protection Act 1948 shall apply to any action, suit, prosecution, or proceedings against the Perbadanan or any member, any member of a committee, or any officer, servant or agent of the Perbadanan in respect of any act, neglect, default or omission done or committed by it or him in such capacity;

(e) the defendant further argued that the Malaysian Treasury Circular at para 4.1 therein ('Surat Setuju Terima, Pesanan Kerajaan dan Inden Kerajaan Bagi Perolehan Kerajaan') requires a contract document to be entered between the parties. In its absence, this entire claim by the plaintiff is rendered unsustainable. In any event, the defendant professed a substantial counterclaim against the plaintiff that can act as a set off

against the plaintiff's claim. The letter of offer (9 March 2017) provides that parties are to ink a formal agreement 45 days after the date of the offer letter. In failing to provide a duly executed and stamped service agreement dated 15 March 2017, this claim is untenable: *Air Hitam Tin Dredging Malaysia Sdn Bhd v YC Chin Enterprise Sdn Bhd* [1994] 2 MLJ 754. Legal authorities cited by the plaintiff in support of encl 102 are of little or no assistance since those cases did not deal with a government as a party; and

(f) what the plaintiff has brought before the court is a tactical manoeuvre and abuse to force the court to make an early determination of this suit before the substantive hearing of the claim.

In the premise, encl 102 should be dismissed with costs.

THE LAW

[10] Interim payment (O 22A of the RC 2012):

(a) an order of advance payment to be made by the defendant for the plaintiff on account of any damages or debt before judgment is pronounced, ordered by the court when it appears that the plaintiff is likely to succeed and obtain a judgment or where the defendant has made an admission of liability;

(b) the goal of O 22A is to alleviate any hardship that may be suffered by the plaintiff during the wait before judgment is pronounced. While need or prejudice may be the usual basis upon which an interim payment is sought, it does not follow that an applicant for interim payment must show such need or prejudice before an interim order may be made: *Main-Line Corporate Holdings Ltd v United Overseas Bank Ltd* [2010] 2 SLR 986 at [32] (CA) (SG).

(c) interim payments can be ordered in actions other than personal injury cases, such as proceedings for contractual claims, actions for wrongful death, product liability actions, wrongful dismissal claims, trespass to land, misappropriation of funds, and actions for property damaged; and

(d) there are strong policy grounds for the courts to order interim payments in an appropriate case. It is in the interests of the administration of justice and plaintiffs in particular that defendants be encouraged to make early voluntary interim payments to alleviate financial hardship on the part of the plaintiffs: *Josu Engineering Construction Sdn Bhd v TSR Bina Sdn Bhd* [2015] 5 MLJ 411; [2015] AMEJ 1544; [2016] 1 CLJ 1 at paras [21]–[22] (CA).

[11] Application for interim payment (O 22A r 2):

(a) the plaintiff may, at any time after the writ has been served on a defendant and the time limited for him to acknowledge service has expired, apply to the court for an order requiring the defendant to make an interim payment;

(b) an application under this ruleshall be made by a notice of application in Form 33 but may be included in an application for summary judgment under O 14;

(c) an application under this rule shall be supported by an affidavit which shall:

(i) verify the amount of the damages, debt, or other sums to which the application relates and the grounds of the application;

(ii) exhibit any documentary evidence relied on by the plaintiff in support of the application; and

(iii) if the plaintiff's claim is made under Part III of the Civil Law Act 1956 [Act 67], contain the full particulars of the person for whom and on whose behalf the action is brought and of the nature of the claim in respect of which damages are sought to be recovered;

(d) the notice of application and a copy of the affidavit in support and any documents exhed thereto shall be served on the defendant against whom the Order is sought not less than fourteen clear days before the return day;

(e) notwithstanding the making or refusal of an order for an interim payment, a second or subsequent application may be made upon cause shown.

[12] Order for interim payment in respect of damages (O 22A r 3):

(a) if, on the hearing of an application under rule 2 in an action for damages, the court is satisfied that:

(i) the defendant against whom the order is sought has admitted liability for the plaintiff's damages;

(ii) the plaintiff has obtained a judgment against the defendant for damages to be assessed; or

(iii) if the action proceeded to trial, the plaintiff would obtain a judgment for substantial damages against the defendant or, where there are two or more defendants, against any of them,

the court may, if it thinks fit and subject to paragraph (2), order the defendant to make an interim payment of such amount as it thinks just, not exceeding a reasonable proportion of the damages, which in the opinion of the court is likely to be recovered by the plaintiff after taking into account any relevant contributory negligence and any set off, crossclaim or counterclaim on which the defendant may be entitled to rely;

(b) an order shall not be made under paragraph (1) in an action for personal injuries if it appears to the court that the defendant is not a person falling within one of the following categories:

(i) a person who is insured in respect of the plaintiff's claim;

(ii) a public authority; or

(iii) a person whose means and resources are such as to enable him to make the interim payment.

[13] Order for interim payment: sums other than damages (O 22A r 4):

If, on the hearing of an application under rule 2, the Court is satisfied that —

(a) the plaintiff has obtained an Order for an account to be taken as between himself and the defendant and for any amount certified due on taking the account to be paid;

(b) the plaintiff's action includes a claim for possession of land, and, if the action proceeded to trial, the defendant would be held liable to pay the plaintiff a sum of money in respect of the defendant's use and occupation of the land during the pendency of the action, even if a final judgment or Order were given or made in favor of the defendant; or

(c) *if the action proceeded to trial, the plaintiff would obtain a judgment against the defendant for a substantial sum of money apart from any damages or costs*,

the Court may, if it thinks fit and without prejudice to any contention of the parties as to the nature or character of the sum to be paid by the defendant, Order the defendant to make an interim payment of such amount as it thinks just, after taking into account any set off, crossclaim or counterclaim on which the defendant may be entitled to rely.

[14] Manner of payment (O 22A r 5):

(a) the amount of any interim payment ordered to be made shall be paid to the plaintiff unless the order provides for it to be paid into court, and where the amount is paid into court, the court may, on the application of the plaintiff, order the whole or any part of it to be paid out to him at such time or times as the court thinks fit;

(b) an application under the preceding paragraph for money in court to be paid out shall be served on the other party;

(c) an interim payment may be ordered to be made in one sum or by such instalments as the court thinks fit; and

(d) where payment is ordered in respect of the defendant's use and occupation of land, the order may provide for periodical payments to be made during the pendency of the action.

[15] Adjustment on final judgment or order or discontinuance (O 22A r 9):

Where a defendant has been ordered to make an interim payment or has, in fact, made an interim payment, whether voluntarily or pursuant to an order, the court may, in giving or making a final judgment or order, or granting the plaintiff leave to

discontinue his action or to withdraw the claim in respect of which the interim payment has been made, or at any other stage of the proceedings on the application of any party, make such order with respect to the interim payment as may be just, and in particular:

(a) an order for the repayment by the plaintiff of all or part of the interim payment, with or without interest; but where interest is Ordered, it shall not exceed fifty percent of the rate as specified under O 42 r 12;

(b) an order for the payment to be varied or discharged; or

(c) an order for the payment by any other defendant of any part of the interim payment which the defendant who made it is entitled to recover from him by way of contribution or indemnity or in respect of any remedy or relief relating to or connected with the plaintiff's claim.

FINDINGS

[16] In a nutshell, the defendant in opposing encl 102 anchored their belief on their view that the plaintiff failed to show on a balance of probability that if the action proceeded to trial, it would secure a judgment for substantial damages against the defendant when the sums claimed are disputed by them, where liability will not be easy to establish. No evidence of hardship suffered by the plaintiff had been adduced to justify this application for an interim payment. All in all argued the defendant, encl 102 is a technical manoeuvre. Perusing their short submissions and arguments, I am unpersuaded with the arguments proffered by the defendant. I am equally unpersuaded that O 22A does not apply to the defendant, as they fall within the term 'government' defined in the respective statutes as claimed. This position taken by the defendant is wholly inconsistent with the legislation and unsupported. It is trite in administrative law that a body corporate such as the defendant being a statutory body does not fall within the definition of Federal Government or State Government of the respective States in the Federation of Malaysia. To hold otherwise would be against the prevailing legal position. With their grounds in opposing the application having no merits in my determination, it leaves only the plaintiff's assertion for my consideration in encl 102.

[17] As observed in *David Chelliah @ Kovilpillai Chelliah David v Monorail Malaysia Technology Sdn Bhd & Anor* [2005] 2 MLJ 260 (CA), the required legal threshold is merely on a preponderance of the evidence (civil burden), and considering the entire materials and arguments proferred by the plaintiff herein, I find that the scale tilted in his favor for an order of interim payment against the defendant. See *Josu Engineering Construction Sdn Bhd v TSR Bina Sdn Bhd* [2015] 5 MLJ 411; [2016] 1 CLJ 1 (CA) that observed, r 3(c) allows interim payment of damages even though liability is still in question. Interim payments can be ordered in actions other than personal injury cases, such as proceedings for contractual claims, actions for wrongful death, product

liability actions, wrongful dismissal claims, trespass to land, misappropriation of funds, and actions for property damaged. It is trite that there is no necessity to show that plaintiff would suffer prejudice if an interim payment is denied. Neither is there a legal necessity to show that a particular sum is required to cover a need. The court is not concerned with how the money is to be spent. The legal issues between the parties will eventually be canvassed, ventilated, and determined at the substantive hearing of the suit before the court. Section 35 protection of the Perbadanan Stadium Malaysia Act 2010 cannot be relied upon at this juncture as it has yet to be established by compelling evidence whether they have acted in good faith or otherwise. This issue is unsuitable for summary disposal (*KL Karnival Sdn Bhd v Perbadanan Stadium Malaysia* [2019] MLJU 836 (HC)).

[18] The Court of Appeal of Singapore observed in *Main-Line Corporate Holdings Ltd v United Overseas Bank Ltd* [2010] 2 SLR 986 CA (SG) that:

(a) r 4 applies to applications for interim payment in respect of actions (excluding costs) other than actions for damages. *The court would have to be satisfied with one of the following*, namely, that the plaintiff has obtained an order for an account to be taken between himself and the defendant for any amount certified due and that the plaintiff's cause of action comprises of a claim for possession of the land where the defendant would be liable to pay the plaintiff a sum of money in respect of occupation of the land if the matter proceeds to trial, or *that the plaintiff would obtain a judgment for a substantial sum apart from damages or costs if the action moves to trial*. The above provision is similar to RC, O 29 r 12 (Singapore);

(b) in construing RC, O 29 r 12(a) (Singapore), which is in pari materia with our O 22A r 4, the Court of Appeal of Singapore observed that whether an order for interim payment should be made involves a two-stage process:

(i) the court must be satisfied that one of the grounds stated in the sub-paragraphs of RC O 29 r 11 and 12 (similar to our O 22A rr 3 and 4) is established. If the court is so satisfied, it has the power to grant an order for an interim payment; and

(ii) the court then considers whether it should exercise its discretion and determine the quantum of such payment.

(c) in determining whether a case is 'fit' for the court to make such an order, prima facie, it would not be appropriate to make such an order where the factual issues raised in the case are complicated or complex points of law are raised therein;

(d) however, the fact that there are sufficient complex issues of fact or law will not prevent the court from ordering an interim payment in respect

of part of a complex claim where there is evidence establishing, with 'reasonable certainty,' a minimum sum which is likely to be recoverable; and

(e) in balancing the parties' interests in an application for interim payment, the court only requires reasonable certainty (rather than absolute certainty) that the proposed interim payment amount is likely to be the minimum sum recoverable.

CONCLUSION

[19] In light of the foregoing and after closely scrutinizing the application, examining all the pleadings, and written and oral submissions of respective counsels before me, I allowed encl 102 with a reduced amount to RM500,000 payable within 30 days from the date of this order with costs of RM5,000 to be paid within 14 subject to 4% allocator.

Enclosure 102 allowed.

Reported by Ashok Kumar